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WONG SHEE KAI v. GOVERNMENT OF MALAYSIA

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ABANG ISKANDAR CJ (SABAH & SARAWAK)
VERNON ONG LAM KIAT FCJ
B RHODZARIAH BUJANG FCJ
ZABIDIN MOHAMAD DIAH FCJ
[SUIT NO: BKA-1-08-2021(W)]
6 OCTOBER 2022

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Abstract – *The Federal Court, in order to guard its exclusive original jurisdiction from abuse, must naturally have the inherent power to set aside any leave granted, pursuant to art. 4(4) of the Federal Constitution, if the narrow and specific conditions of the art. 4(3) are not met. Leave can only be granted if there is jurisdiction and so, a grant of leave is not capable of becoming the basis of jurisdiction.*

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CONSTITUTIONAL LAW: *Jurisdiction – Federal Court – Petition – Challenge against constitutional validity of ss. 63 and 64 of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether subject matter of petition within original jurisdiction of court – Whether leave to file petition ought not to have been granted – Whether Federal Court can consider question of own jurisdiction once leave granted – Federal Constitution, art. 4(3) & (4)*

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The petitioner was a party to, at least, two criminal forfeiture proceedings initiated by the Public Prosecutor ('PP') respectively in two separate criminal applications ('motions'). In both motions, the PP alleged that the petitioner had absconded and, on that basis, sought to invoke ss. 63 and 64 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUAA') against the petitioner. The petitioner opposed the motions and the motions had been stayed pending the disposal of the present petition. The present petition was filed in the exclusive original jurisdiction of the Federal Court, pursuant to leave granted by a Federal Court Judge under art. 4(3) and (4) of the Federal Constitution ('FC'). In this petition, the petitioner essentially sought to challenge the constitutional validity of ss. 63 and 64 of the AMLATFPUAA. Resisting the petition, the respondent argued that the subject matter of the petition was beyond the original jurisdiction of the court and, as such, leave to file the petition ought not to have been granted. The question that arose for determination was whether the Federal Court could consider the question of its own jurisdiction to hear a petition once leave had been granted.

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Held (setting aside leave order; striking out petition)
Per Tengku Maimun Tuan Mat CJ delivering the judgment of the court:

(1) Article 4(3) of the FC carves out the specific subject matters upon which a petition may be brought in the original jurisdiction of the Federal Court. Article 4(4) of the FC goes on to stipulate that leave of a judge of the Federal Court is required. If the requirements of art. 4(3) of the FC are not met, then *prima facie*, a Federal Court Judge hearing the leave motion under art. 4(4) of the FC is not entitled to grant leave. In this case, leave had been granted and the petition had been filed. Regardless, it was open to this court to revisit the grant of leave and to set it aside, if it is found that leave ought not to have been granted in the first place. This power to set aside a previously granted leave order, by the subsequent substantive panel, for the petition, was within the ambit of the inherent powers of this court. This is found in r. 137 of the Rules of the Federal Court 1995. Thus, if it is found at any stage before, during or after the hearing of the merits of a petition that the initial grant of leave was bad for want of jurisdiction, this court is entitled, after hearing parties, to set aside the leave order previously granted. Once set aside, the petition having no leg to stand on, must be struck out. (paras 8, 9 & 21)

(2) Any 'incompetency' challenge encompasses a situation where Parliament or the State Legislature is not, in the first place, empowered to even enact the impugned law. It would not strictly matter in those circumstances whether the law exceeds other restrictions or conditions imposed by the FC because the scrutiny in an 'incompetency' challenge is to ascertain the source of the power to make that law with the view to seeking declaratory relief to the effect that relevant Legislature (Federal or State) had no power to make that law. (para 34)

(3) The present petition disclosed an 'inconsistency' challenge poorly disguised as an 'incompetency' challenge. The petition was bad and incompetent. The subject matter of the constitutional challenge in this case can and must be raised at the High Court and, as such, was beyond the exclusive original jurisdiction of this court. Leave to file the petition, under art. 4(4) of the FC, ought not to have been granted and allowing the petition to proceed any further would be an abuse of the process of this court. (para 41)

Bahasa Melayu *Headnotes*

Pempetisyen adalah pihak dalam, sekurang-kurangnya, dua prosiding jenayah pelucuthakkan yang dimulakan oleh Pendakwa Raya ('PR') dalam, masing-masing, dua permohonan jenayah berasingan ('usul-usul'). Dalam kedua-dua usul, PR mendakwa bahawa pempetisyen telah melarikan diri dan, berasaskan itu, memohon untuk membangkitkan ss. 63 dan 64 Akta Pencegahan Akta Pengubahan Wang Haram dan Pencegahan Pembiayaan

Keganasan 2001 ('AMLATFPUAA') terhadap pempetisyen. Pempetisyen membantah usul-usul tersebut dan kedua-duanya digantung sementara pelupusan petisyen ini. Petisyen ini difailkan dalam bidang kuasa asal eksklusif Mahkamah Persekutuan, susulan kebenaran oleh seorang Hakim Mahkamah Persekutuan bawah per. 4(3) dan (4) Perlembagaan Persekutuan ('PP'). Dalam petisyen ini, pempetisyen khususnya ingin mencabar kesahan keperlembagaan ss. 63 dan 64 AMLATPUAA. Membantah petisyen, responden menegaskan bahawa hal perkara petisyen melangkaui bidang kuasa asal mahkamah dan, ekoran itu, kebenaran memfailkan petisyen tidak sepatutnya dibenarkan. Soalan yang timbul untuk diputuskan adalah sama ada Mahkamah Persekutuan boleh mempertimbangkan soalan tentang bidang kuasanya sendiri untuk mendengar petisyen apabila kebenaran telah diberi.

Diputuskan (mengetepikan perintah kebenaran; membatalkan petisyen)
Oleh Tengku Maimun Tuan Mat KHN menyampaikan penghakiman mahkamah:

(1) Perkara 4(3) PP memperihalkan hal-hal perkara khusus yang membolehkan petisyen dimulakan dalam bidang kuasa asal Mahkamah Persekutuan. Perkara 4(4) PP seterusnya menyatakan bahawa kebenaran seorang Hakim Mahkamah Persekutuan adalah dikehendaki. Jika syarat-syarat per. 4(3) PP tidak dipenuhi, maka *prima facie*, seorang Hakim Mahkamah Persekutuan yang mendengar usul kebenaran bawah per. 4(4) PP tidak berhak memberi kebenaran. Dalam kes ini, kebenaran telah diberi dan petisyen sudah difailkan. Walau demikian, terbuka buat mahkamah ini melihat semula kebenaran yang diberi dan mengetepikannya, jika didapati bahawa kebenaran tidak sepatutnya diberi dari awal lagi. Kuasa mengetepikan perintah kebenaran yang sebelum ini telah diberi, oleh panel substantif terkemudian, untuk petisyen, adalah dalam rangkuman kuasa inheren mahkamah ini. Ini terkandung dalam k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995. Oleh itu, jika didapati bahawa pada mana-mana peringkat sebelum, semasa atau selepas pendengaran merit-merit petisyen bahawa berian kebenaran asal tidak sah kerana bidang kuasa, mahkamah ini berhak, selepas mendengar pihak-pihak, mengetepikan perintah kebenaran yang sebelum ini diberi. Apabila diketepikan, petisyen tersebut yang tidak lagi mampu untuk berdiri, harus diketepikan.

(2) Apa-apa cabaran 'ketakkompetenan' meliputi situasi yang Parlimen atau Badan Perundangan Negeri tidak, dari awal lagi, berkuasa untuk menggubal undang-undang berkenaan. Tidaklah, secara ketat, penting dalam hal-hal keadaan tersebut sama ada mahkamah melangkaui lain-lain sekatan atau syarat yang dikenakan oleh PP kerana penelitian dalam cabaran 'ketakkompetenan' adalah untuk menentukan sumber kuasa menggubal undang-undang tersebut untuk memohon relief pengisytiharan yang memberi kesan bahawa Badan Perundangan (Persekutuan atau Negeri) tidak mempunyai kuasa menggubal undang-undang tersebut.

(3) Petisyen ini mendedahkan cabaran 'ketakkonsistenan' yang lemah disamarkan sebagai satu cabaran 'ketakkompetenan'. Petisyen ini tidak sah dan tidak kompeten. Hal perkara dalam cabaran keperlembagaan dalam kes ini boleh dan mesti dibangkitkan di Mahkamah Tinggi dan, dengan itu, melangkaui bidang kuasa asal eksklusif mahkamah ini. Kebenaran memfailkan petisyen, bawah per. 4(4) PP, tidak seharusnya dibenarkan dan membenarkan agar petisyen diteruskan adalah satu salah guna proses mahkamah ini.

Case(s) referred to:

Ah Thian v. Government Of Malaysia [1976] 1 LNS 3 FC ***(refd)***
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***
Chan Yock Cher v. Chan Teong Peng [2005] 4 CLJ 29 FC ***(refd)***
Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors [2018] 4 CLJ 1 FC ***(refd)***
Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 465 FC ***(refd)***
Mohd Khairul Azam Abdul Aziz v. Menteri Pendidikan Malaysia & Anor [2020] 9 CLJ 309 FC ***(refd)***
Petroliam Nasional Bhd (Petronas) v. Kerajaan Negeri Sarawak [2018] 10 CLJ 433 FC ***(refd)***
Rethana M Rajasigamoney v. The Government Of Malaysia [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323 FC ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 63, 64
Courts of Judicature Act 1964, ss. 84, 85, 96
Dangerous Drugs Act 1952, s. 37(d), (da)
Education Act 1996, ss. 17, 28
Federal Constitution, arts. 4(1), (3), (4), 5, 8, 74, 121, 128(1), 152, Ninth Schedule
Rules of the Federal Court 1995, r. 137

For the petitioner - Nahendran Navaratnam, Wong Wye Wah & Ivanpal Singh Grewal; M/s AJ Ariffin Yeo & Harpal
For the respondent - Suzana Atan, SFC & Kogilambigai, FC

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat CJ:

Introduction

[1] This is a petition filed in the exclusive original jurisdiction of the Federal Court pursuant to leave granted by a judge of this court under art. 4(3) and (4) of the Federal Constitution ('FC'). The petition essentially sought to challenge the constitutional validity of ss. 63 and 64 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATPUAA 2001').

[2] The reliefs sought *vide* para. 18 of the petition are as follows:

> 18.1. A declaration that Section 63 of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 is invalid and/or void because it is inconsistent with and contrary to Article 5 and/or Article 8 of the Federal Constitution;
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> 18.2. A declaration that Section 64 of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 is invalid and/or void because it is inconsistent with and contrary to Article 5 and/or Article 8 of the Federal Constitution;
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> 18.3. Such further and/or other reliefs deemed fit and just by this Honourable Court.

[3] Upon perusing the petition and upon considering the written and oral submissions of parties, we were constrained to strike out the petition. We now provide the grounds for our decision.

Background Facts

[4] The petitioner is a party to at least two criminal forfeiture proceedings initiated by the Public Prosecutor respectively in two separate criminal applications ('the motions'). In both the motions, the Public Prosecutor alleged that the petitioner has absconded and, on that basis, sought to invoke ss. 63 and 64 of the AMLATPUAA 2001 against the petitioner. The petitioner opposed the motions and the motions have been stayed pending the disposal of this petition. For reasons that will be apparent later, we do not find it necessary to reproduce ss. 63 and 64 of the AMLATPUAA 2001.

[5] The respondent, in their defence to the petition, resisted this petition on several grounds but the one we found most relevant is the argument that the subject-matter of this petition is an inconsistency challenge and not an incompetency challenge. The respondent thus maintained that the subject-matter of the petition is beyond the original jurisdiction of this court and as such, leave to file this petition ought not to have been granted. The respondent has been consistent in taking this position as they advanced the same argument at the leave stage which was evidently rejected.

[6] The respondent's objection raised a crucial question: can this court consider the question of its own jurisdiction to hear a petition once leave has been granted. In other words, can the court revisit the issue of whether leave ought not to have been granted in the first place, and if it is found that such a power exists, and the grant of leave is revisited, what is to become of the petition?

The Power Of The Substantive Panel To Revisit The Grant Of Leave Under Article 4(3) And (4) Of The Federal Constitution

[7] The substantive provision conferring exclusive original jurisdiction to the Federal Court to hear certain limited matters is art. 128(1) of the FC. The procedure for it is contained within art. 4(3) and (4). For convenience, these provisions are reproduced below:

> **Article 128**
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> 128. (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:
>
> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
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> (b) disputes on any other question between States or between the Federation and any State.
>
> **Article 4**
>
> (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or:
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.
>
> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[8] Article 4(3) carves out the specific subject matters upon which a petition may be brought in the original jurisdiction of the Federal Court. Article 4(4) then goes on to stipulate that leave of a judge of the Federal Court is required. It is safe to say that if the requirements of art. 4(3) are not met, then *prima facie*, a judge of the Federal Court hearing the leave motion under Article 4(4) is not entitled to grant leave.

[9] In this case however, leave has been granted and the petition has been filed. Regardless, it is our view that it is open to this court to revisit the grant of leave and to set it aside, if it is found that leave ought not to have been granted in the first place. This power to set aside a previously granted leave order by the subsequent substantive panel for the petition is within the ambit of the inherent powers of this court. If at all a statutory provision is required for it, then it is to be found in r. 137 of the Rules of the Federal Court 1995 ('RFC 1995') which reads thus:

> **137. Inherent Powers of the Court**
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> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice **or to prevent an abuse of the process of the Court**.
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> (emphasis added)

[10] The application of the above provision can be understood in practical terms by reference to the decision of this court in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153; [2020] 2 MLJ 1 ('*Asia Pacific*').

[11] That case concerned an appeal from the decision of a High Court Judge on an amendment application which found its way to the Court of Appeal and then the Federal Court. Leave to appeal to the Federal Court was granted pursuant to s. 96 of the Courts of Judicature Act 1964 ('CJA 1964') on two different questions of law unrelated to the question of appealability. During the hearing of the appeal proper, a preliminary objection was raised on whether the order/decision of the High Court Judge was in the first place appealable. A majority of the Federal Court found that the matter was not in the first place appealable and as such, the Court of Appeal was not competent to hear the appeal. It followed that even the Federal Court was without jurisdiction to hear the leave questions.

[12] Now, even though the Federal Court in *Asia Pacific* did not directly refer to r. 137 of the RFC 1995, the majority of this court, in the judgment of Idrus Harun FCJ [107] to [108], when deciding whether they could reconsider the question of jurisdiction in spite of the grant of leave, referred no less to another prior judgment of this court in *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29; [2005] MLJU 673 ('*Chan Yock Cher*'). This is what this court held in *Chan Yock Cher*.

> From the cases, it is clear that, so far, this court had only given orders that its previous decisions, judgments or orders be set aside and ordered that the appeals be re-heard when such decisions, judgments or orders were a nullity or invalid because the court giving such decisions, judgments or orders was not properly constituted.

> We do not say that the circumstances under which this court would set aside its previous decisions, judgments or orders and for the re-hearing of the appeals are closed. Neither do we intend to list down the circumstances that warrant such an order. However, to give two examples, there may be jurisdictional error, for example, where the court inadvertently heard and decided on an appeal which, in law, is patently not appealable to this court, or due to illegality where this court inadvertently imposed a sentence unknown in law or in excess of the maximum sentence permissible by law.

[13] We are aware that both *Asia Pacific*, and *Chan Yock Cher* concerned this court's appellate jurisdiction and that in *Asia Pacific*, this court did not set aside the leave order it previously granted. Instead, it allowed the appeal and set aside the decision of the Court of Appeal on the ground that the appeal was incompetent. These procedural issues decided in those cases are unique to appeals. This court in *Asia Pacific* was constrained to allow the appeal to set aside the decision of the Court of Appeal which was delivered without jurisdiction to restore the order of the High Court. Setting aside the leave order and striking out the appeal would not have achieved that purpose.

[14] Here, we are dealing with the original jurisdiction of the Federal Court, the primary procedure for which is provided for directly by the FC unlike say the procedure for leave to appeal in s. 96 of the CJA 1964 (a statute).

[15] There is a reason why the original jurisdiction of the Federal Court is very limited, narrowly circumscribed and jealously guarded, as alluded to by Azmi FJ in *Rethana M Rajasigamoney v. The Government Of Malaysia* [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323; [1984] 2 MLJ 52, at p. 325 (CLJ); p. 54 (MLJ), as follows:

> Under our Constitution, the Federal Court is an appellate Court and its exclusive original jurisdiction is limited. In my opinion, this particular original jurisdiction of the Federal Court conferred by Article 128(1)(a) read with section 45 of the Courts of Judicature Act 1964 should be strictly construed and confined to cases where the validity of any law passed by Parliament or any State Legislature is being challenged on the ground that Parliament has legislated on a matter outside the Federal List or Concurrent List; or a State Legislature has enacted a law concerning a matter outside the State List or the Concurrent List as contained in the Ninth Schedule to the Federal Constitution. *To extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved litigants of their right of appeal to the highest Court in the land.*
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> (emphasis added)

[16] The above passage was endorsed and cited with approval in a very recent judgment of this court in *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 465; [2021] 2 MLJ 323 ('*Iki Putra*'), at [23].

[17] The very confined nature of the jurisdiction of the Federal Court is borne out by the following. First, art. 128(1) of the FC itself calls it the 'exclusive original jurisdiction' which suggests that no other court is capable of having it. Second, art. 4(3) of the FC uses prohibitory language in that the validity of laws 'shall not be questioned' unless filed in the original jurisdiction for the exclusive reasons stated in paras. (a) or (b) of that article. This means that the exclusive original jurisdiction is not to be invoked lightly.

[18] The other point is this. As many of the recent judgments of this court have clarified, art. 4 of the FC must be read in harmony with art. 121 of the same. The judicial power of the Federation is vested in the two High Courts and it must follow that where constitutional issues can be raised before the High Court, they ought to be so raised there as being the first court in the judicial hierarchy to be entrusted with such powers. Ignoring that and allowing cases to come directly to the Federal Court is to ignore our very own constitutional design. After all, even constitutional references must be initiated in the High Court, which court retains the discretion to decide whether to hear the constitutional challenge or to transmit them to the Federal Court under ss. 84 and 85 of the CJA 1964.

[19] It must then follow as a matter of common sense that this court, in order to guard its exclusive original jurisdiction from abuse, must naturally have the inherent power to set aside any leave granted pursuant to art. 4(4) of the FC if the narrow and specific conditions of art. 4(3) were not met.

[20] To put it another way, while leave under art. 4(4) of the FC is required to file a petition in this court's original jurisdiction to address the challenges contemplated in art. 4(3) of the FC, the grant of leave itself is not the basis of jurisdiction of this court. Leave can only be granted if there is jurisdiction, and so the grant of leave is not capable of becoming the basis of jurisdiction.

[21] Thus, if it is found at any stage before, during or after the hearing of the merits of a petition that the initial grant of leave was bad for want of jurisdiction, this court is entitled, after hearing parties, to set aside the leave order previously granted. And once set aside, the petition having no leg to stand on must, as a matter of course, be struck out. The only question pending now is whether the present petition is caught by such circumstances.

Whether The Present Petition Is Bad

[22] The jurisprudence on the interpretation of art. 4(3) was very clearly explained by Suffian LP in *Ah Thian v. Government Of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 ('*Ah Thian*'). Long after that judgment, the law entered a state of flux until it was eventually put right by this court in *Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors* [2018] 4 CLJ 1; [2018] 3 MLJ 417 ('*Gin Poh*'). In *Iki Putra*, this court went a step

further and explained the difference between 'inconsistency' and 'incompetency' challenges with the view to simplifying the understanding of cls. (1) and (3) of art. 4. We shall now attempt to explain it again.

[23] The constitutionality of any written law may, depending on the circumstances, be challenged in the original jurisdiction of the Federal Court or in the High Court. Regardless of where it is challenged, if the law is found to be invalid, art. 4(1) which stipulates that the law is void to the extent of the inconsistency, is triggered. The natural result is that the law will be struck down.

[24] Viewed in this way, every single constitutional challenge whether in the Federal Court's original jurisdiction or otherwise, is an inconsistency challenge. If the relevant Legislature had no power to make it, it is void under art. 4(1). If the relevant Legislature had power to make it, but the law itself was in excess of limits demarcated by the FC or if that law violates fundamental liberties under Part II, then it is also inconsistent with the FC and shall be struck down under art. 4(1). Again, this is because of the use of the word 'inconsistent' in art. 4(1).

[25] In that sense, 'incompetency' challenges, are so to speak, a very defined species of 'inconsistency' challenges involving a very specific allegation under art. 4(3) in that Parliament or the State Legislature had no power to make it. And they require leave under art. 4(4) before they can be initiated and the relief sought in the petition must be limited to declaratory relief to the effect that the relevant provision is invalid on the ground that the relevant Legislature (Federal or State) had no power to make it. Article 4(3) and (4) do not otherwise contemplate any other form of relief. See generally: *Petroliam Nasional Bhd (Petronas) v. Kerajaan Negeri Sarawak* [2018] 10 CLJ 433; [2018] 12 MLJ 43, [6] to [7].

[26] Thus, for ease of reference, any challenge that requires leave under art. 4(3) of the FC is called an 'incompetency' challenge while all other challenges that can be brought before the High Court are called 'inconsistency challenges' even though the result of both might be that under art. 4(1) the impugned provision of law is inconsistent with the Federal Constitution.

[27] To cite some examples, in a typical 'incompetency' challenge, there is an allegation that the State Legislature made a law which falls within the Federal List, or Parliament made a law which falls within the State list and is not supported by the Concurrent List, or that any Legislature (Federal or State) made a law which is not expressly sanctioned by any of the Legislative Lists in the Ninth Schedule of the FC. In short, the impugned law is invalid because the Legislature simply has no power to make it. This is unique to our FC because under art. 4(1), it is the FC that is supreme and not Parliament or any of the State Legislatures. These legislative bodies are

limited by the FC in the types of laws they are entitled to make. These are the challenges contemplated by art. 4(3) which fall under the original jurisdiction of the Federal Court under art. 128(1). The use of the phrase 'incompetency' challenge is merely for easy reference in practice.

[28] Any other challenge which alleges that a particular provision of law is invalid because it is inconsistent with the Federal Constitution – usually Part II – is not caught by art. 4(3) and must be brought in the first instance, to the High Court. It is in this sense that such challenges are called 'inconsistency' if considered against 'incompetency' challenges.

[29] Thus, all 'incompetency' challenges are, in their broader sense, 'inconsistency' challenges, but not all 'inconsistency' challenges are 'incompetency' challenges. An 'inconsistency' challenge, being the larger concept, is incapable of being converted into the narrower concept of an 'incompetency' challenge. In other words, one cannot allege, for example, that a law is in violation of art. 5 of the FC and since it is null and void premised on that inconsistency, Parliament or the State Legislature (as the case may be) is not empowered to make it. If that were the case, then there would be no reason for art. 4(3) of the FC to specifically single out cases where allegations are made that the relevant Legislature had no power to make the law from all other types of challenges of constitutional validity.

[30] A specific example of this can be found in *Mohd Khairul Azam Abdul Aziz v. Menteri Pendidikan Malaysia & Anor* [2020] 9 CLJ 309; [2020] 1 MLJ 398 ('*Khairul Azam*'). The applicant in that case sought leave to file a petition in the original jurisdiction of the Federal Court arguing that Parliament had no power to make ss. 17 and 28 of the Education Act 1996 because they were inconsistent with art. 152 of the FC. Azahar Mohamed CJM refused leave on the basis that the challenge was not, in essence, an incompetency challenge (although he did not explain it using that term). His Lordship held as follows:

> [22] Leaving the issue of the legislative competency of Parliament to enact the impugned provisions on one side for a moment, I am satisfied that the declaratory reliefs sought by the applicant do not come within the ambit of arts. 4(3) and (4) of the Federal Constitution. The present leave application instituted by the applicant under art. 4(4) is in essence, a challenge to the constitutional validity of the impugned provisions. This is not a case where declaration is sought that the impugned provisions are invalid on the ground that it is related to a matter with respect to which Parliament had no power to make such law. It would be wrong to conclude that this is a case where Parliament has strayed beyond matters within their legislative competence, with reference to the matters based on the legislative lists in the Ninth schedule. In substance, the primary declaration sought for in the present case is that the impugned provisions are inconsistent with art. 152. If so, it would be void by reason of art. 4(1).

> Hence, the declaratory reliefs sought for by the applicant are not within the exclusive original jurisdiction of the Federal Court. The declaratory reliefs sought for are within the original jurisdiction of the High Court. The High Court is competent to hear such challenges.

[31] Parliament was, in that case, found to be empowered to enact ss. 17 and 28 of the Education Act 1996 under item 13 of the Federal List. The allegation that those provisions were unconstitutional were premised on their inconsistency with art. 152.

[32] The *Khairul Azam* case assists to further appreciate the difference between 'inconsistency' and 'incompetency' challenges which can be explained in this way. In a country like the United Kingdom, the unwritten constitution mandates that Parliament is supreme. This means that Parliament itself is the conferrer of powers and its legislative powers are otherwise uncircumscribed. That is not the case in Malaysia. Here, Parliament (Federal) and the State Legislatures of the respective States were created by the FC and their powers are limited by it because the FC is supreme. In this regard, the powers of Parliament and the State Legislatures are conferred upon them by art. 74 which reads thus:

> **Subject matter of federal and State laws**
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> 74. (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.
>
> (3) The power to make laws conferred by this art. is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

[33] A pure 'inconsistency' challenge presupposes that Parliament (or State Legislature) has the power to enact the impugned law or provision but that the provision is not valid because it was made in excess of a condition or restriction imposed by the Federal Constitution. The various legislative entries are construed as liberally as possible so as not to limit the law-making powers (see, *Gin Poh*, at [52]). Taking *Khairul Azam* (*supra*) as an example, Parliament had the power to enact ss. 17 and 28 of the Education Act 1996 under the Federal list because they relate to education and so it is a separate matter entirely to say that though empowered to enact those sections, they ran afoul of the conditions or restrictions imposed by art. 152 of the FC.

[34] To summarise, any 'incompetency' challenge encompasses a situation where Parliament or the State Legislature is not in the first place, empowered to even enact the impugned law. It would not strictly matter in those

A circumstances whether the law exceeds other restrictions or conditions imposed by the Federal Constitution because the scrutiny in an 'incompetency' challenge is to ascertain the source of the power to make that law with the view to seeking declaratory relief to the effect that the relevant Legislature (Federal or State) had no power to make that law.

B **Application Of The Law To The Present Petition**

[35] Having restated the law on the subject, we now turn to the present petition. We had earlier reproduced the prayers above and they are very patently an 'inconsistency' challenge that does not fall within the ambit of this court's original jurisdiction.

C

[36] As such, there is clear non-compliance with art. 4(3) of the FC and for this reason, leave ought not to have been granted under art. 4(4) of the FC. And, as mentioned earlier, the grant of leave itself cannot confer jurisdiction where there is none.

D **[37]** For ease of reference, we also reproduce the grounds of the petition as follows:

> 16. Sections 63 and 64 of AMLA are void and/or invalid under art. 4(1) of the Federal Constitution because they are inconsistent with the Federal Constitution on the following grounds:
>
> E
>
> 16.1. They subject the Petitioner to a double presumption that is disproportionate and unjustified;
>
> 16.2. They deprive the Petitioner of his presumption of innocence as guaranteed by art. 5 of the Federal Constitution; and
>
> F 16.3. They treat the Petitioner differently from any other individual, thereby offending the right to equality guaranteed by art. 8 of the Federal Constitution ...

[38] The present challenge is hinged on arts. 5 and 8 of the FC and this is therefore very patently an 'inconsistency' challenge. In fact, the reliefs sought G in para. 18 of the petition do not exclusively seek declaratory relief to the effect that ss. 63 and 64 are invalid on the ground that Parliament had no power to make them, as envisaged by art. 4(3) of the FC, but on the basis that they are inconsistent, *inter alia*, with arts. 5 and 8 of the FC. The iteration in para. 17 of the petition that 'Parliament has no power to make H a law which is inconsistent with the Federal Constitution' does not convert this petition into an incompetency challenge.

[39] Further, we note that in the case of *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1 ('*Alma Nudo*'), the challenge mounted was on the application of a double presumption under s. 37(d) and I (da) of the Dangerous Drugs Act 1952. It will be recalled that there, an opposite objection was raised, *ie*, that the matter ought not to have proceeded by way of an appeal to the Federal Court but should have been brought in its exclusive original jurisdiction. The Federal Court, in following *Gin Poh*,

overruled the objection. The arguments on art. 121 of the FC and the double presumption hinged on arts. 5 and 8 of the FC, was dealt with in its appellate jurisdiction. For the reasons stated above, we found that that was correctly done.

[40] In these circumstances, we do not consider it necessary to reproduce and read ss. 63 and 64 of the AMLATPUAA 2001 because their constitutional validity is not being challenged on the basis that Parliament cannot make them, but on the basis that they have been made within power, exceeded the limits established by arts. 5 and 8 of the FC.

Conclusion

[41] Based on the foregoing, we found that this petition disclosed an 'inconsistency' challenge poorly disguised as an 'incompetency' challenge. The petition is bad and incompetent. The subject matter of the constitutional challenge in this case can and must be raised at the High Court and, as such, is beyond the exclusive original jurisdiction of this court. It is therefore our view that leave to file the petition under art. 4(4) of the FC ought not to have been granted and allowing this petition to proceed any further would be an abuse of the process of this court.

[42] In the circumstances, we set aside the leave order dated 5 January 2022, and the petition, having no leg to stand on, was struck out.